188 (3)

MAY 17 2011

No. 10-1199

In the Supreme Court of the United States

EXTREME NETWORKS, INC.,
Petitioner,

v.

ENTERASYS NETWORKS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

MARGARET M. DUNCAN*
KEITH M. STOLTE
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Suite 4400
Chicago, Illinois 60606
(312) 372-2000
mduncan@mwe.com

M. MILLER BAKER
MICHAEL S. NADEL
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner Extreme Networks, Inc.
** Counsel of Record*

May 2011

TABLE OF CONTENTS

REPLY TO BRIEF IN OPPOSITION 1
CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Dunn v. Truck World, Inc.,
929 F.2d 311 (7th Cir. 1991) 6, 8

Harris v. Ballard,
158 F.3d 1164 (11th Cir. 1998) 12

Herzog Contracting Corp. v. McGowen Corp.,
976 F.2d 1062 (7th Cir. 1992) 6

Int'l Rectifier Corp. v. IXYS Corp.,
515 F.3d 1353 (Fed. Cir. 2008) 10, 11

KSR Int'l Co. v. Teleflex, Inc.,
550 U.S. 398 (2007) 2

Longstreth v. City of Tulsa,
948 F.2d 1193 (10th Cir. 1991) 13

Osterneck v. Ernst & Whinney,
489 U.S. 169 (1989) ..... passim

Smith v. Barry,
502 U.S. 244 (1992) 11

Teleflex, Inc. v. KSR Int'l Co.,
119 F. App'x 282 (Fed. Cir. 2005) 2

Thomas v. Morton Int'l, Inc.,
916 F.2d 39 (1st Cir. 1990) 13

United States v. Cohn,
166 F. App'x 4 (4th Cir. 2005) 11

United States v. Little,
392 F.3d 671 (4th Cir. 2004) 13

White v. New Hampshire Dep't of Employment Security,
455 U.S. 445 (1982) 7

STATUTES

28 U.S.C. § 1291 5
28 U.S.C. § 1292(c)(2) 5
28 U.S.C. § 1295(a)(1) 5
35 U.S.C. § 284 ..... 4, 5

RULES

Fed. R. App. P. 3 ..... 12, 13
Fed. R. App. P. 3(c)(1)(B) 14
Fed. R. App. P. 4(a)(4)(A)(iv) 4
Fed. R. App. P. 4(a)(4)(A)(vi) 4
Fed. R. Civ. P. 59(e) 4, 6, 7, 9
Fed. R. Civ. P. 60(b) 4, 9
Fed. R. Civ. P. 60(b)(2) 7

REPLY TO BRIEF IN OPPOSITION

Respondent has failed to contest the certworthiness of this case. The petition presents two important questions of federal practice on which the courts of appeals are divided.

As to three of petitioner's four reasons for granting the petition, the brief in opposition is simply silent. Respondent does not contest that the courts of appeals are sharply divided over the meaning of this Court's decision in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), and whether a money judgment for a sum certain is final in the absence of any award of prejudgment interest. Nor does respondent dispute the existence of a circuit split regarding whether the time to appeal runs from the date of an order granting a postjudgment tolling motion or from the date of any subsequent amended judgment. Finally, respondent does not dispute that both questions presented involve important and recurring questions of federal practice that implicate day-to-day litigation in federal courts throughout the nation.

Rather than dispute any of these reasons for granting the petition, respondent mainly responds with merits arguments disputing petitioner's fourth and final reason for granting the petition—that the Federal Circuit's decision was erroneous. Respondent argues that the district court's November Judgment was nonfinal under the Federal Circuit's own caselaw and because of the district court's retention of jurisdiction. Respondent argues alternatively that, if the November Judgment was

final, then the time for respondent to file its notice of appeal nevertheless ran from the date of the district court's entry of the Amended Judgment. As respondent has not identified any defects in this case as a vehicle to reach the questions presented, this Court should grant the petition.

1. Respondent first argues that because the Federal Circuit's decision was "nonprecedential," it was not worthy of en banc review by the Federal Circuit. Br. Opp'n at 2–4. The nonprecedential nature of the decision below, however, does not render this case a defective vehicle to resolve the two undisputed circuit splits implicated by the questions presented. Rather, this Court regularly reviews unreported or nonprecedential decisions as vehicles to resolve important questions of federal law. *See, e.g.*, *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007) (reviewing and reversing the Federal Circuit's nonprecedential decision in *Teleflex, Inc. v. KSR Int'l Co.*, 119 F. App'x 282 (Fed. Cir. 2005)). Indeed, as discussed below, respondent confirms that the Federal Circuit's decision below is fully consistent with precedential decisions of that court.

2. Respondent asserts that "the pending issues that precluded finality" at the time of the district court's November Judgment "were not limited to prejudgment interest, as Extreme would have this Court misguidedly believe, but included a calculation of pretrial [supplemental] damages and the scope of the permanent injunction." Br. Opp'n at 4. However, the former issue (damages) is a merits issue, while the latter issue (the scope of the

injunction) is irrelevant to either certworthiness or the merits.

a. As to damages, respondent argued below that the November Judgment was not final because the damage award did not include supplemental damages or prejudgment interest sought by petitioner. *See* Pet. at 12. Although the Federal Circuit did not address respondent's contention concerning supplemental damages, that contention is subsumed within the first question presented.

For purposes of finality, there is no difference between prejudgment interest and supplemental damages, as both are "element[s] of [plaintiff's] complete compensation." *See Osterneck*, 489 U.S. at 175. As explained in the petition, resolution of the first question presented will also dispose of respondent's argument, advanced below and now here, that the November Judgment was not final because it did not include all damages sought by petitioner. *See* Pet. at 21 & n.4, 29 & n.10. Petitioner contends that the November Judgment, as an unqualified money judgment for a sum certain, was final because it necessarily denied petitioner's claim for *both* supplemental damages and prejudgment interest. *See id.* Thus, respondent's argument that the absence of an award of supplemental damages in the November Judgment precluded finality is nothing more than a merits argument subsumed by the first question presented.

b. As to the injunction's scope, respondent never contended below that the November Judgment was nonfinal because the scope of the injunction was

somehow unsettled when the district court entered that judgment. Nor, in truth, does respondent actually make such an argument here. Rather, when respondent explains its injunction-related argument, respondent simply notes that both parties filed *post*-judgment motions within ten days of the November Judgment. *See* Br. Opp'n at 7; *see also* Pet. at 10 (describing petitioner's Federal Rule of Civil Procedure 59(e) motion to modify the injunction and respondent's Federal Rule of Civil Procedure 60(b) motion to modify the injunction). But there was no "pending" issue as to the scope of the injunction when the district court entered the November Judgment—the parties merely raised this issue *after* the November Judgment was entered. Although both motions tolled the time to appeal *if* the November Judgment was otherwise final, *see* Fed. R. App. P. 4(a)(4)(A)(iv) and (vi), neither motion is relevant to the first question presented: whether the unqualified November Judgment for a sum certain was final *when entered*. Therefore, respondent's vague reference to the "scope of the injunction" as somehow affecting the finality of the November Judgment is a feint, irrelevant to either certworthiness or the merits.

3. Respondent argues that the Federal Circuit's holding that an unqualified money judgment is nonfinal if it does not include prejudgment interest is consistent with that circuit's caselaw holding that a money judgment is nonfinal if it does not award all damages the patentholder is entitled to under the patent damages statute, 35 U.S.C. § 284. *See* Br. Opp'n at 8–13. Respondent is correct. This only buttresses the case for granting the petition, because

it confirms the Federal Circuit's position on one side of the circuit split implicating the first question presented.

The statutory requirement for finality in the Federal Circuit is identical to the statutory requirement for finality in the regional circuits. *Compare* 28 U.S.C. § 1295(a)(1) (conferring appellate jurisdiction in the Federal Circuit in appeals from "final decision[s]" in patent cases) *with* 28 U.S.C. § 1291 (conferring appellate jurisdiction upon the regional circuits from "final decisions"). Nothing in Section 284 creates a different test for finality in patent infringement cases[1]; if an otherwise final judgment for a sum certain does not award all of the damages that a patent holder is entitled to under Section 284, all that means is that the judgment is *erroneous*, not nonfinal, and that the plaintiff's

---

[1] Although finality in the Federal Circuit and the regional circuits is identical, the Federal Circuit does possess unique *interlocutory* jurisdiction not shared by the regional courts of appeals. *See* 28 U.S.C. § 1292(c)(2) (providing for exclusive jurisdiction in the Federal Circuit of appeals from a judgment in a civil action for patent infringement that is "final except for an accounting," i.e., final except for an award of damages). Section 1292(c)(2) does not create a different test for finality in patent infringement cases; it simply provides for interlocutory appeals in such cases that are final "*except* for an accounting." 28 U.S.C. § 1292(c)(2) (emphasis added). Although respondent repeatedly cites to Section 1292(c)(2), *see* Br. Opp'n at 2, 9, 10, respondent did not argue below, and does not argue here, that the Federal Circuit's appellate jurisdiction in this case could be sustained under that statute.

recourse is either to seek to amend the judgment under Civil Rule 59(e) or to appeal. *Cf. Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064 (7th Cir. 1992) (the omission of prejudgment interest from an otherwise final judgment "*would not have detracted from the finality of the original judgment; it just would have made it erroneous*") (emphasis added) (Posner, J.).

Thus, the Federal Circuit's test for finality conflicts with the alternative test employed by most circuits. The Federal Circuit holds that a money judgment's failure to award prejudgment interest or other damages to which the plaintiff is entitled by statute renders the judgment nonfinal. Br. in Opp. at 11–13; Pet. App. at 6a–8a. But several other circuits hold that the failure to award prejudgment interest—and by logical extension, any other element of compensatory relief to which the plaintiff may be entitled—does not affect finality. Instead, in those circuits, relief must be sought by either a timely Civil Rule 59(e) motion to amend the judgment, or by appeal. Pet. at 18–20 (collecting cases). And decisions such as *Dunn* clarify that such decisions are final even if the unawarded damages were requested prior to the judgment's entry, because the entry of an unqualified judgment necessarily denies all outstanding requests for relief. *See Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991). This Court should grant certiorari to resolve this circuit conflict, in which the Federal Circuit has taken one side.

4. Respondent argues that this case is different from *Osterneck* because the November Judgment

lacked supplemental damages as well as prejudgment interest, whereas in *Osterneck* the original judgment only lacked prejudgment interest. *See* Br. Opp'n at 14. As noted above, this distinction is not material, as prejudgment interest and damages are both elements of compensation. For present purposes, the significance of *Osterneck* is that this Court assumed that a money judgment for a sum certain was final and that the only way to modify that judgment was through a timely-filed Civil Rule 59(e) motion to alter or amend the judgment. *See Osterneck*, 489 U.S. at 177 (stating that "the decision whether a particular pending motion falls under Rule 59(e) will of necessity determine whether an *otherwise final* judgment is appealable") (emphasis added); *see also id.* at 175 (noting that, in *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982), the Court stated that the determination of whether a given motion was a Civil Rule 59(e) motion "'all but' answered the finality question").

Respondent also argues that this case is distinguishable from *Osterneck* because petitioner's motion for prejudgment interest admittedly could not have been a Civil Rule 59(e) motion as it was filed beyond that rule's applicable time limit.[2] *See* Br. Opp'n at 15. Once again, this distinction is not

---

[2] In the Federal Circuit below, petitioner characterized its motion for prejudgment interest as a Civil Rule 60(b)(2) motion for relief from judgment based upon newly discovered evidence. Respondent disputed that characterization. Resolution of that dispute is not necessary to resolve the two questions presented.

material, as the significance of *Osterneck* is that this Court treated a money judgment for a sum certain as final for purposes of categorizing the motion for prejudgment interest in that case.

5. Respondent also argues that the November Judgment could not be final because the district court retained jurisdiction to decide supplemental damages and prejudgment interest. Br. in Opp. at 6. Respondent's argument that the retention of jurisdiction defeated finality is at most a merits argument, which does not render this case a defective vehicle for reaching the first question presented. And on the merits of the first question presented, respondent's argument is wrong for two separate and independent reasons.

First, respondent omits that the district court's retention of jurisdiction *predated* the entry of the November Judgment. *See* Pet. App. 32a (retaining jurisdiction in Opinion and Order dated October 28th, 2008 "to award plaintiff supplemental damages, interest, or costs"). The November Judgment, on the other hand, was both for a sum certain and unqualified. Pet. App. 33a–35a (November Judgment). As a result, the November Judgment must be treated as having denied petitioner's outstanding requests for supplemental damages and prejudgment interest. *See Dunn*, 929 F.2d at 313 (entry of judgment denies all pending requests for relief, because "[a]ny other approach produces a morass"). Because nothing in the November Judgment itself—an unqualified money judgment for a sum certain—suggests that the district court reserved the issues of supplemental

damages and prejudgment interest for later resolution, the November Judgment must be taken at face value.

Second, to the extent that the district court's November Judgment can be read to incorporate the earlier retention of jurisdiction, a retention of jurisdiction is not a reservation of issues for future decision that destroys finality. The former is just an axiomatic truism: a district court retains jurisdiction for specified time periods under Civil Rules 59(e) or 60(b) to resolve issues that may arise after the entry of a final judgment, whether a court says so expressly or not, without any effect upon the judgment's finality. Thus, in *Osterneck*, the district court's instruction to the plaintiff to file a Rule 59(e) motion to seek prejudgment interest did not destroy finality. *See* 489 U.S. at 171. To negate the finality of an otherwise final judgment that adjudicates all claims and grants, as here and as in *Osterneck*, unqualified relief, a district court must reserve an issue for future resolution—not just restate its authority to resolve future disputes.

6. As to the second question presented, respondent likewise simply makes a merits argument. Respondent argues that, even if the November Judgment were final, the district court's modification of the injunction in the Amended Judgment restarted the time to appeal from the date of the entry of the Amended Judgment. Br. Opp'n at 7.

As noted in the petition, a circuit split exists regarding whether the time to appeal runs from the

date of an order granting a postjudgment tolling motion or from the date of any subsequent amended judgment. *See* Pet. 22–26. Respondent does not deny either the existence of this split or that, absent an alternative ground to sustain the judgment below, its appeal would be untimely if this Court holds both that the November Judgment is final and that the time to appeal runs from the date of an order granting a postjudgment tolling motion, as petitioner contends. This Court should therefore grant certiorari to resolve this split.

7. Finally, respondent proffers an alternative merits argument to sustain the Federal Circuit's judgment. Respondent argues that its motion to stay the district court's injunction pending appeal—filed two days after entry of the November Judgment—can and should be treated as a surrogate notice of appeal under the authority of *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008) (treating motion to stay injunction pending appeal as notice of appeal).[3]

Respondent's alternative ground to sustain the judgment below provides no reason for this Court to deny the petition on the two certworthy questions presented. Instead, this Court should grant the petition and order merits briefing and argument. Respondent can assert its alternative ground to sustain the decision below. If this Court rules in favor of petitioner on the questions presented, this Court can then consider whether to entertain

---

[3] Respondent raised this argument below, but the Federal Circuit did not address it.

respondent's alternative ground or to remand to the Federal Circuit to allow that court to consider it in the first instance. But, in either event, this Court or the Federal Circuit would easily dispose of respondent's argument.

In *Smith v. Barry*, 502 U.S. 244 (1992), this Court held that a document filed by a *pro se* party within the relevant time limitations to appeal may be treated as the "functional equivalent" of a notice of appeal under Federal Rule of Appellate Procedure 3 if the document "provide[s] sufficient notice to other parties and the courts" of the putative appellant's "intent to seek appellate review." *Id.* at 248. Although this Court adopted the rule within the context of affording a lenient construction to a *pro se* party's filings, some circuits have—rightly or wrongly—applied the same standard to represented parties such as respondent. *See Int'l Rectifier*, 515 F.3d at 1357; *but see United States v. Cohn*, 166 F. App'x 4, 9–10 (4th Cir. 2005) (noting that majority of cases following *Smith v. Barry* involve *pro se* parties; holding represented party to higher standard).

Thus, even assuming the *Smith v. Barry* rule could be applied to this case, respondent still cannot establish that its motion for stay of the injunction satisfied the requirements of Appellate Rule 3. In order to serve as the functional equivalent of a notice of appeal, a filing "must specifically indicate the litigant's intent to seek appellate review . . . to ensure that the filing provides sufficient notice to other parties and the courts." *Barry*, 502 U.S. at 248; *see also Cohn*, 166 F. App'x at 10–11 (court of appeals refusing to construe motion that only

indicated party's desire to file appeal in the future as functional equivalent to notice of appeal).

Here, respondent's motion for a stay of the injunction opened by stating that "an appeal *will be filed following the resolution of all post-trial motions*," and later stated that respondent intended to file a motion for a new trial. Fed. Cir. A19915–A19916 (emphasis added). In fact, respondent filed its motion for a new trial on November 20, 2008 (Dkt. No. 389). Once the district court disposed of all post-trial motions, respondent filed, albeit untimely, its notice of appeal. As a result, respondent's language and actions notified petitioner and the district court that respondent neither intended to divest, nor believed that it had divested, the district court of jurisdiction over the case by filing its motion for stay of injunction.

Thus, respondent's motion for stay was not the functional equivalent of a notice of appeal. It did not indicate that the final November Judgment was, in the words of Appellate Rule 3(c)(1)(B), *"being appealed."* For example, if the district court had granted respondent's yet-to-be filed motion for a new trial, respondent would not have pursued an appeal at that time, if ever. Given these signals, the motion did not provide notice to petitioner or the district court that respondent was appealing the November Judgment. *See Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998) (refusing to treat motion to extend time to appeal as notice of appeal because it provided insufficient notice of intent to appeal and "compels the conclusion that the notice of appeal is something yet to be filed"); *Longstreth v. City of*

Tulsa, 948 F.2d 1193, 1994 (10th Cir. 1991) (same); *Thomas v. Morton Int'l, Inc.*, 916 F.2d 39, 40 (1st Cir. 1990) ("To treat such a request for extra time as the notice itself would be to render the notice requirement meaningless."); *United States v. Little*, 392 F.3d 671, 681 (4th Cir. 2004).

Indeed, respondent recognized the difference between its motion for stay and a notice of appeal when, out of time, it later filed a notice of appeal. *See Thomas*, 916 F.2d at 40 (declining to find extension request was functional equivalent of notice of appeal where counsel subsequently filed an untimely notice of appeal). As a result, respondent's own conduct undermines any argument that the motion for stay can or should be construed as a surrogate notice of appeal. Rather, respondent's motion to stay cannot save the Federal Circuit's jurisdiction over respondent's untimely appeal.

CONCLUSION

For the reasons provided above and in the petition for a writ of certiorari, this Court should grant the petition.

Respectfully submitted.

MARGARET M. DUNCAN*
KEITH M. STOLTE
McDERMOTT WILL & EMERY LLP
227 West Monroe Street
Suite 4400
Chicago, Illinois 60606
(312) 372-2000
mduncan@mwe.com

M. MILLER BAKER
MICHAEL S. NADEL
JEFFREY W. MIKONI
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner Extreme Networks, Inc.
**Counsel of Record*